

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA

Plaintiff,

and

SIERRA CLUB

Intervenor-plaintiff,

vs.

DTE ENERGY COMPANY AND
DETROIT EDISON COMPANY,

Defendants.

Civil Action No. 10-CV-13101
HON. BERNARD A. FRIEDMAN

ORDER ENTERING PARTIAL FINAL JUDGMENT AND STAYING THE CASE
PENDING APPEAL

Before the Court is the government's unopposed motion for entry of partial final judgment pursuant to Fed. R. Civ. P. 54(b) [docket entry 218]. Also before the Court is intervenor-plaintiff's motion seeking identical relief [docket entry 201] and defendants' motion to stay this matter pending appeal [docket entry 219]. The Court will rule on the motions without oral argument pursuant to E.D. Mich. LR 7.1(f)(2).

In its March 3, 2014, order [docket entry 196] the Court granted defendants' motion for summary judgment on the ground that they had not violated EPA's regulations governing preconstruction emission projections when they renovated an electric utility steam generating unit ("Unit 2") at their Monroe, Michigan power plant without first obtaining a New Source Review ("NSR") permit from the Michigan Department of Environmental Quality ("MDEQ").

Thereafter, the Court allowed the government and intervenor-plaintiff to amend their complaints by adding claims regarding several other construction projects. Both the government and intervenor-plaintiff now seek immediate appellate review of the Court's March 3, 2014, order although the additional claims remain pending.

Rule 54(b) allows for "immediate review of certain district court orders prior to the ultimate disposition of a case." Gen. Acquisition, Inc. v. GenCorp., Inc., 23 F.3d 1022, 1026 (6th Cir. 1994). Certifying a judgment for appeal under Rule 54(b) is a two-step process. "First, the district court must expressly direct the entry of final judgment as to one or more but fewer than all the claims or parties in a case. Second, the district court must expressly determine that there is no just reason to delay appellate review." Id. (quotation marks and citations omitted). The second step requires district courts to evaluate the following nonexhaustive list of factors, namely:

(1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense and the like.

Id. at 1030 (quoting Corrosioneering, Inc. v. Thyssen Env'tl. Sys., Inc., 807 F.2d 1279, 1283 (6th Cir. 1986)). A district court must provide sufficient grounds for certifying an immediate appeal otherwise the Sixth Circuit Court of Appeals will not have jurisdiction to entertain the matter. See Adler v. Elk Glenn, LLC, No.14-5159, 2014 U.S. App. LEXIS 13044, at *1-4 (6th Cir. Jul. 10, 2014); Soliday v. Miami County, 55 F.3d 1158, 1163 (6th Cir. 1995).

With respect to the first step, the Court will enter final judgment solely on the NSR claim

related to Unit 2. At the very least, this ruling leaves unresolved the outstanding claims associated with the construction projects at the Belle River Plant and the Trenton Channel Plant, neither of which “share a single aggregate of operative facts” with the Unit 2 NSR claim.

GenCorp., Inc. v. Olin Corp., 390 F.3d 433, 442 (6th Cir. 2004) (quotation marks omitted).

As for the second step, the Court agrees with the parties that there is no just reason to delay immediate appellate review. First, the Unit 2 NSR claim is separate and distinct from the unadjudicated claims. Second, it does not appear that the need for immediate appellate review would be obviated by further developments in this Court. Third, the Sixth Circuit would not be faced with the likelihood of considering the same issue again. In fact, partial judgment would provide the Sixth Circuit with the opportunity to further elucidate the legal standard this Court should use to evaluate defendants’ compliance with the NSR regulations. Fourth, there is no claim or counterclaim of which this Court is aware that would result in a set-off against the judgment. And fifth, considerations of delay and judicial economy weigh in favor of certifying this matter for immediate appellate review. Such review would clarify the appropriate legal framework for determining whether defendants adhered to the NSR regulations, significantly narrow the legal and factual issues presented in any subsequent proceedings, and ultimately shorten the time and expense associated with a trial. Accordingly,

IT IS ORDERED that the government’s unopposed motion for entry of partial final judgment is granted.

IT IS FURTHER ORDERED that intervenor-plaintiff’s motion seeking identical relief is

granted.

IT IS FURTHER ORDERED that defendants' motion to stay this matter pending appeal is granted.

S/ Bernard A. Friedman_____
BERNARD A. FRIEDMAN
SENIOR UNITED STATES DISTRICT JUDGE

Dated: August 5, 2014
Detroit, Michigan